Supreme Court, U.S.
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No. 01-187

In The

Supreme Court of the United States

GEORGE DANIELS,

Petitioner,

v.

CITY OF ARLINGTON, TEXAS and
THERON BOWMAN, CHIEF
OF POLICE, ARLINGTON, TEXAS,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

FRANK WAITE
Assistant City Attorney
Counsel of Record
ELIZABETH LUTTON
Assistant City Attorney
BARBARA HEPTIG
Assistant City Attorney
Post Office Box 231
Arlington, Texas 76004-0231
(817) 459-6878
(817) 459-6897 (FAX)

Arlington City Attorney's Office
Counsel for Respondents
City of Arlington, Texas and
Theron Bowman, Chief of Police,
Arlington, Texas

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FOREWORD iii

STATEMENT OF THE CASE 1

SUMMARY OF RESPONDENTS' ARGUMENT 3

REASONS FOR DENYING THE PETITION FOR WRIT 3

I. The Decision is Consistent With This Court's Prior Holding That a "Rational Basis" Standard is Applicable for Reviewing Restrictions on the Appearance of Uniformed Military and Police Personnel 3

II. The Fifth Circuit Assumed *Arguendo* That Petitioner's Religious Expression Was a Matter of Public Concern Protected Under *Pickering* 5

III. Petitioner Misstates the Law By Confusing Standards for Reviewing Government Censorship With Standards for Justifying Speech Restriction On Government Employees 6

IV. The "Rational Basis" Analysis of *Employment Division, Department of Human Resources of Oregon v. Smith* Was Properly Applied to Petitioner's Free Exercise of Religion Claim 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) 11

Board of Educ. v. Mergens, 496 U.S. 226 (1990) .....

Brown v. Hot, Sexy and Safer Productions, Inc., 68 F.3d 525 (1st Cir. 1995) 9

Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 7

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 7

Connick v. Myers, 461 U.S. 138 (1983).....3, 4, 5, 6, 7, 8

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) 8, 9, 10

Goldman v. Weinberger, 475 U.S. 503 (1986)..... 4, 5, 8

Hernandez v. Commissioner, 490 U.S. 680 (1989)..... 11

Kelley v. Johnson, 425 U.S. 238 (1976) 4, 5

Kissinger v. Board of Trustees, 5 F.3d 177 (6th Cir. 1993)..... 9

Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) 10

Pickering v. Board of Educ., 391 U.S. 563 (1968) 3, 4, 5, 6, 7, 8

Swanson v. Gutherie Indep. Sch. Dist., 135 F.3d 694 (10th Cir. 1998)..... 9

Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 (1969) 7

United States Dep't of Justice v. Federal Labor Relations Auth., 955 F.2d 998 (5th Cir. 1992)..... 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Board of Educ., 911 F.2d 882 (3rd Cir. 1990) 11

Vandiver v. Hardin County Bd. of Ed., 925 F.2d 927 (6th Cir. 1991) 9

Waguespack v. Rodriguez, 220 B.R. 31 (Bankr. W.D. La. 1998) 9

Warner v. City of Boca Raton, 64 F.Supp.2d 1272 (S.D. Fla. 1999) 9

Waters v. Churchill, 511 U.S. 661 (1994) 7

UNITED STATES CONSTITUTION

First Amendment United States Constitution .... *passim*

FOREWORD

Citations to the Record on Appeal before the Fifth Circuit will be referred to as "Rec." followed by the page number to which the reference is made. Citations to the Appendix attached to the Petition for Writ of Certiorari will be referred to as "App." followed by the page number to which the reference is made.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents City of Arlington, Texas and Theron Bowman, Chief of Police, Arlington, Texas, request that this Court deny the Petition for Writ of Certiorari ("Petition") of George Daniels ("Petitioner") seeking review of the Fifth Circuit's opinion in this case reported at 246 F.3d 500 (5th Cir. 2001).

STATEMENT OF THE CASE

Petitioner's Statement of the Case, Question Presented for Review, and Reasons for Granting Review contain two significant misstatements of fact.

First, contrary to Petitioner's rendition, the evidence in the summary judgment record does not show that the Police Chief ever approved or allowed items of personal symbolic expression to be worn by uniformed police officers. The record reflects that the City has a written policy which is intended to strictly control the appearance of uniformed police officers – it includes the so-called "no-pins" policy. [Rec. 208-212.] The Chief enforced these restrictions by meeting with employees and personally emphasizing the importance of a professional public image. [App. F1.] Moreover, there is no evidence that the Chief approved, or even had knowledge of the various personal items Daniels says he saw, or heard about, being worn by various officers during his thirteen years of employment. The Chief did not, and would not, approve any item that was not related to law enforcement. [Rec. 299.] Daniels was the only officer to make a written request to wear a personal item. [Rec. 295.] While his

request was denied, he failed to show that the Chief had given approval to any other officer to wear a personal item on his uniform. Petitioner admitted that he had no personal knowledge of items not listed in the General Orders being approved by the Chief. But, he relied entirely on his own conclusory, incompetent affidavit and misstatements of the Chief's deposition testimony in attempting to create a genuine issue of fact over Petitioner being "singled out." [Rec. 435, 482-84, and 534-35.] The district court and the Fifth Circuit both found no discrimination after reviewing the competent summary judgment evidence. [App. A11-13; C3.] Accordingly, Petitioner's characterization that "numerous pins were being conspicuously worn" and "allowed" by the Chief is inaccurate, misleading, and unsupported by the record. [Petition 18.]

Second, contrary to Petitioner's contention, the City did come forward with evidence of its legitimate governmental interest in regulating the appearance of its police uniform. [Rec. 214-215; 296.] The record reflects that the Chief articulated the desire to maintain the uniform as a symbol of neutral government authority, free from expressions of personal bias, in a well-disciplined, and professional police department. *Id.* He specifically cited his desire to prohibit items of personal expression not related to law enforcement as the basis of his decision to deny Petitioner's request to wear a cross on his uniform. Both the district court and the Fifth Circuit cited this evidence. [Rec. 296; App. A8; D7.] While the Petitioner may discount and challenge this rationale, it is inaccurate, misleading, and unsupported by the record to argue that this evidence was not proferred.

SUMMARY OF RESPONDENTS' ARGUMENT

The Petition for Writ of Certiorari should be denied. The uniform restrictions of the police department are content neutral and have a rational basis in promoting the efficiency of the department. Any effects the restrictions have on Petitioner's free speech or free exercise of religion are incidental. The Fifth Circuit was correct in holding that the restrictions pass constitutional muster under both the "rational basis" standard and "balancing of the interests" standard. Petitioner's complaints about the manner in which the *Pickering/Connick* "balancing" test was applied by the Fifth Circuit do not show a conflict between the circuits on any matter dispositive to this case. Petitioner's argument that a "strict scrutiny" standard should be applied to review police uniform regulations is meritless in the context of this public employment law case. However, if "strict scrutiny" is the applicable standard of review, the challenged restrictions meet this standard.

REASONS FOR DENYING THE PETITION FOR WRIT

I.

The Decision is Consistent With This Court's Prior Holding That a "Rational Basis" Standard is Applicable for Reviewing Restrictions on the Appearance of Uniformed Military and Police Personnel.

This dispute arose in the specific context of a City regulating the appearance of its uniformed police officers. The City has not adopted a rule regulating the dress of the general citizenry or even non-police municipal

employees. In this factually narrow context, this Court has given clear guidance on the appropriate analytical framework for reviewing claims that constitutional rights to free expression have been violated. In *Kelley v. Johnson*, 425 U.S. 238 (1976), this Court upheld police uniform and grooming standards against numerous theories of constitutional rights violations. Ten years later, in *Goldman v. Weinberger*, 475 U.S. 503 (1986), this Court upheld military uniform regulations barring the wearing of a yarmulke from a First Amendment challenge.

The Fifth Circuit started its analysis in the present case by noting that the City "surely passes" the deferential "rational basis" review standard applied by this Court in *Kelley* and *Goldman*. [App. A5.] Accordingly, this case is properly resolved in favor of the City under these precedents. However, the Fifth Circuit also held that the challenged uniform restrictions survived the stricter standard for reviewing restrictions on government employee speech promulgated by this Court in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). [App. A5.] The *Pickering* standard balances "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the state, as employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see also Connick v. Myers*, 461 U.S. 138 (1983). While the Fifth Circuit reached the correct result, application of the *Pickering/Connick* test was clearly superfluous to the disposition of this case. The court applied the less deferential "balancing of the interests" standard of *Pickering/Connick*, in order to follow its analysis in *United States Dep't of Justice v. Federal Labor Relations Auth.*, 955 F.2d 998 (5th Cir. 1992) (upholding

regulations prohibiting Border Patrol agents from wearing union pins on their uniform).

Because the Fifth Circuit was correct in recognizing that *Kelley* and *Goldman* were controlling Supreme Court precedent, and Petitioner has not cited and discussed these cases in his Brief, this Petition should be denied.

II.

The Fifth Circuit Assumed *Arguendo* That Petitioner's Religious Expression Was a Matter of Public Concern Protected Under *Pickering*.

The City's police uniform standards do not, on their face, target free speech or religious expression. The district court and Fifth Circuit agreed that the restrictions were facially neutral. On these facts, it is not necessary to apply the *Pickering/Connick* "balancing" standard. The deferential "rational basis" standard is appropriate, as discussed above. Nevertheless, recognizing that a "balancing" test has been applied by numerous courts to review various restrictions placed on speech of public employees, the Fifth Circuit used it as a doctrinal framework in this case. The Fifth Circuit first addressed whether Petitioner was engaging in speech relating to a "legitimate public concern" by symbolically expressing his religious affiliation. [App. A6.] The court noted that Petitioner's speech in "content, form, and context" was intensely personal and not a matter of public concern. *Id.* But, the Fifth Circuit went on to assume, *arguendo*, that Petitioner's speech did involve a public concern. In other words, the case was not decided on this issue. For this reason, the Petitioner fails to show that the decision is in

conflict with the decision of any other circuit finding religious expression to be a matter of public concern under *Pickering*. The Fifth Circuit's determination that Petitioner's speech was not on a matter of public concern is well reasoned, but did not decide the outcome of the case.

Moreover, the Petitioner's argument that the lower courts erred by refusing to proceed with a full *Pickering* analysis is incorrect. [Petition 21.] It is clear that, while both the district court and Fifth Circuit did not find Petitioner was speaking on a matter of public concern, both courts went on to balance the interests of the parties in order to determine whether the challenged restrictions were constitutionally permissible. [App. A8; D5-8.] Accordingly, no conflict in decisions exists between the Fifth Circuit and other circuits over whether the *Pickering/Connick* standard should be applied in cases that involve the religious speech of public employees. For this reason, the Petition should be denied.

III.

Petitioner Misstates the Law By Confusing Standards for Reviewing Government Censorship With Standards for Justifying Speech Restriction On Government Employees.

The lower courts did not accept Petitioner's argument that the proper test for reviewing the City's police uniform regulations should be "strict scrutiny." Nor did the Fifth Circuit apply the censorship analysis Petitioner argued was appropriate to attack the alleged "unfettered" discretion of the Police Chief to control the appearance of

the City's police uniform. Now, Petitioner argues in the public employment law framework of *Pickering/Connick* that the City must establish that the forbidden conduct "materially and substantially interfere[s] with requirements of appropriate discipline." [Petition 9, *citing Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969), *citing* to *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).] Additionally, Petitioner contends that the City must "establish neutral criteria to insure that the licensing decision is not based on the context or viewpoint of speech being considered." [Petition 26, *citing City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 782 (1988).]

Petitioner, however, is wrongly grafting the First Amendment jurisprudence establishing the heavy burden of the government in the context of censorship cases, and is attempting to apply it to the City under the *Pickering/Connick* test. The teaching of this Court in *Waters v. Churchill*, 511 U.S. 661, 672 (1994), is contrary to Petitioner's argument. "Constitutional review of government employment decisions must rest on different principles than review of speech restraints imposed by government as a sovereign." *Id.* at 674. This is because, "the government interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as an employer." *Id.* at 675. The government cannot restrict the speech of the public at large just in the name of efficiency. But, where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. *Id.*

Petitioner fails to acknowledge that the record establishes the Arlington Police Department has a need for uniformity, discipline, and the appearance of neutrality and impartiality. [Rec. 213-15.] Under the applicable deferential basis standard, this rationale requires no evidence of harm to government operations in order to enforce uniform restrictions. *See Goldman*, at 508; and *Kelley*, at 248. Moreover, even under the stricter *Pickering/Connick* standard, this Court has "given substantial weight to government employers' reasonable predictions of disruption." *Waters*, at 673. (Deference given to government employer's prediction of harm used to justify restrictions on employee speech without evidence of tangible, present interference with the agency's operation.) Therefore, Petitioner's grafting "strict scrutiny" standards onto the City's burden under the *Pickering/Connick* test is contrary to the decisions of this Court. The Fifth Circuit correctly found that the City's interest in regulating the appearance of its police uniforms outweighed the interest of Petitioner to identify himself as a Christian by wearing a cross on his uniform. [App. A8.] Because the interests of the parties were properly balanced without applying "strict scrutiny" to the City's rationale for regulating the appearance of its police uniform, the Petition should be denied.

IV.

The "Rational Basis" Analysis of *Employment Division, Department of Human Resources of Oregon v. Smith* Was Properly Applied to Petitioner's Free Exercise of Religion Claim.

The Fifth Circuit held that Petitioner's free exercise of religion claim fits squarely within this court's decision

in *Smith*, 494 U.S. 872 (1990). The Arlington Police Department's uniform policy is a "valid and neutral law of general applicability," which proscribes conduct that Petitioner's religion allegedly prescribes. *Smith*, at 879. Therefore, the "rational basis" test under *Smith* should be used to evaluate his claim.

However, Petitioner argues that his case is a "hybrid" claim in which the "strict scrutiny" test applies. *See Smith*, at 881. In general, courts have not allowed parties to evade the holding of this court in *Smith* by simply asserting multiple claims. *See Kissinger v. Board of Trustees*, 5 F.3d 177, 180 (6th Cir. 1993); *Vandiver v. Hardin County Bd. of Ed.*, 925 F.2d 927, 933 (6th Cir. 1991); *Warner v. City of Boca Raton*, 64 F.Supp.2d 1272, 1288, n.12 (S.D. Fla. 1999). Otherwise, a creative pleader need only assert a variety of claims, thus creating a "hybrid" case triggering "strict scrutiny" analysis. By this tactic, "it would be extremely difficult to imagine any free exercise claim that would not fit into the 'hybrid' classification." *Waguespack v. Rodriguez*, 220 B.R. 31, 35-36 (Bankr. W.D. La. 1998). Thus, the *Smith* holding would be nullified and avoided by merely pleading multiple claims.

Instead, to assert a true "hybrid" claim, it is not sufficient to simply invoke another constitutional claim to trigger "strict scrutiny." *Swanson v. Gutherie Indep. Sch. Dist.*, 135 F.3d 694, 700 (10th Cir. 1998). The plaintiff must show interference with an independently protected constitutional right. *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 539 (1st Cir. 1995). At its core, Petitioner's claim is a free exercise claim in which he objects to regulations prohibiting his wearing a gold cross on his police uniform. He does not assert any other interference

with his right to speak or to exercise his religion. In this situation, his First Amendment free speech claim is indistinguishable from his First Amendment free exercise claim. Petitioner's own arguments confirm this because he uses both claims interchangeably in his Brief. Consequently, he cannot show an independently protected constitutional right, as required by this Court's holding in *Smith*, necessary to establish a "hybrid" claim.

Moreover, he has never clearly articulated or established his freedom of association claim. In order to establish a "hybrid" claim, he must at least establish a colorable separate claim. *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999). Again, a plaintiff cannot force a "strict scrutiny" analysis merely by combining a free exercise claim with an utterly meritless claim of the violation of another fundamental right. *Miller*, at 1208.

Since Petitioner cannot show the violation of a distinct fundamental right, he cannot show that he has asserted a "hybrid" claim to preclude the application of the "rational basis" test dictated by *Smith*. Therefore, the Fifth Circuit was correct in considering his claim under the "rational basis" test. The police department clearly has a rational basis for the uniform rule, which promotes the neutral appearance of its officers. For this reason, his Petition should be denied.

Alternatively, the record shows that the City should prevail even under a "strict scrutiny" test. First, Petitioner failed to make a threshold showing that being restricted from wearing a cross on a police uniform is a substantial burden on his exercise of religion. Petitioner was afforded the options of: (1) wearing a cross ring or

bracelet instead of a pin on the uniform; (2) wearing the pin under his uniform shirt or collar; or (3) transferring to a non-uniformed position, where he could continue to wear the pin. [App. 2.] In light of these accommodations, the district court correctly found the City's "no-pins policy" to be only a "minimal intrusion on the First Amendment Rights of police officers." [App. D8.] This finding is consistent with the decisions of this Court. *See Hernandez v. Commissioner*, 490 U.S. 680, 699; and *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 61 (1986).

Second, the Fifth Circuit recognized that the "form [of Petitioner's speech (the cross pin)] melds with authority symbolized by the police uniform, running the risk that the City may appear to endorse Daniels' religious message." [App. 6.] This Court has instructed, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect." *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). By demanding that a police uniform be opened as a forum for free speech and free exercise, Petitioner seeks to create public confusion over the authority endorsed and represented by the symbol of an official police uniform. The City has a compelling governmental interest in preserving religious neutrality that justifies limiting Petitioner's freedom to practice his religion by wearing a cross on a police uniform. *See United States v. Board of Educ.*, 911 F.2d 882, 889 (3rd Cir. 1990). Thus, the record establishes that Petitioner failed to establish a substantial burden on his religious exercise, and the City established a compelling

government interest in restricting his personal modification to the police uniform. For these reasons, too, the Petition should be denied.

CONCLUSION

For all or any of the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

FRANK WAITE
Assistant City Attorney
ELIZABETH LUTTON
Assistant City Attorney
BARBARA HEPTIG
Assistant City Attorney
Post Office Box 231
Arlington, Texas 76004-0231
(817) 459-6878
(817) 459-6897 (FAX)

Arlington City Attorney's Office
Counsel for Respondents
City of Arlington, Texas and
Thereon Bowman, Chief of Police,
Arlington, Texas

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